IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-764

OTIS BOWEN Governor of the State of Indiana; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner and the Executive Officer of the Indiana State Board of Health; THEODORE L. SENDAK, Attorney General of the State of Indiana; Their agents, assigns, successors, representatives, those acting in concert with them, and all others similarly situated.

Appellants,

-vs-

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated,

Appellees.

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated,

Appellees.

JURISDICTIONAL STATEMENT

Come now the Appellants, Otis Bowen, Governor of the State of Indiana; Henry Kowalczyk, Lake County Prosecutor; Indiana State Board of Health: William T. Paynter,

M.D., State Health Commissioner and the Executive Officer of the Indiana State Board of Health; Theodore L. Sendak, Attorney General of the State of Indiana; their agents, assigns, successors, representatives, those acting in concert with them, and all others similarly situated, by Theodore L. Sendak, Attorney General of Indiana, and Susan J. Davis, Deputy Attorney General, and pursuant to 28 U.S.C. § 1253 and Rule 13 of the Rules of the Supreme Court of the United States, submit their Jurisdictional Statement in the above-entitled cause.

OPINIONS BELOW

The opinion of the three-judge panel of the United States District Court for the Northern District of Indiana, Hammond Division, issued in the above-entitled cause on September 14, 1976, has not been officially reported. A copy of the opinion is appended as Appendix A.

Appended as Appendix B is an Order of the United States District Court for the Northern District of Indiana, Hammond Division, dated January 31, 1975, issuing a preliminary injunction.

STATEMENT OF GROUNDS OF JURISDICTION

This appeal is from the decision of a three-judge District Court issued on September 14, 1976. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1253. The Notice of Appeal was filed in the United States District Court for the Northern District of Indiana, Hammond Division, on October 8, 1976. See Appendix C.

This appeal results from the aforementioned decision which declared unconstitutional a provision of the abortion law, IC 35-1-58.5-2(a)(2), Burns' Ind. Stat. Ann. § 10-108

(a)(2), requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy, and which entered a permanent injunction prohibiting the appellants from enforcing said statute. That statute provides as follows:

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:
>
> (a) During the first trimester of pregnancy for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:
>
> • • •
>
> (2) The woman submitting to the abortion has filed her consent with said physician. If said woman is unmarried and is less than eighteen (18) years of age said consent shall be jointed by a parent or other person in loco parentis . . .

Cases which sustain jurisdiction in this Court are *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *U.S. v. Georgia Public Service Commission*, 371 U.S. 285 (1963).

QUESTION PRESENTED

Whether the United States District Court, Northern District of Indiana, Hammond Division, erred in declaring an Indiana statutory provision, IC 35-1 58.5-2(a)(2), Burns' Ind. Stat. Ann. § 10-108(a)(2) unconstitutional and in permanently enjoining the appellants from enforcing said statute.

STATEMENT OF THE CASE

Course of Proceedings

On November 13, 1974, this action commenced with the filing of a complaint by Gary-Northwest Indiana Women's

Services, Inc.; William R. Lewis, M.D.; Jane Doe; Mary Roe; Brigitte Coe; and all others similarly situated. The Complaint sought a temporary restraining order, declaratory judgment and preliminary and permanent injunctive relief against various Indiana officials, the Appellants herein, charged with the enforcement of the Indiana abortion statute IC 35-1-58.5, Burns' Ind. Stat. Ann. § 10-107 through 10-114. The Complaint sought a declaration that the aforementioned statute constituted a violation of the plaintiffs'/appellees' constitutional right of privacy, protected by the due process clause of the Fourteenth Amendment. The complaint requested that the plaintiffs/appellees be permitted to proceed as representatives of a class and that this action be permitted to proceed as a class action. The plaintiffs/appellees filed a "Memorandum in Support of Temporary Restraining Order." On December 17, 1974, the defendants/appellants filed a "Memorandum in Opposition to Issuance of Temporary Restraining Order."

Pursuant to the plaintiffs' request, a three-judge court was convened. A hearing was held on December 13, 1974, to consider the appropriateness of granting temporary relief. The court treated the plaintiffs' request as one for a preliminary injunction. On January 31, 1975, the three-judge District Court found that Brigitte Coe and Mary Roe were not entitled to injunctive relief. The court further found that Jane Doe, an unmarried pregnant woman under eighteen (18) years of age, was entitled to injunctive relief, and issued an order preliminarily enjoining the defendant state officials, the appellants herein, from enforcing IC 35-1-58.5-2(a)(2), Burns' Ind. Stat. Ann. §-10-108(a)(2). See appendix B.

In February 1975, the defendants/appellants filed a "Motion to Dismiss", "Motion for Appointment of Guardian Ad Litem", and "Motion to Deny Class Action". On April 11, 1975, the plaintiffs/appellees filed a memorandum in opposition to each of the above-mentioned motions. On May 29, 1975, plaintiffs/appellees filed a "Motion for Class Action Certification and Determination Pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure."

On September 14, 1976, the three-judge District Court issued its "Order and Memorandum," the subject of this appeal, which granted the plaintiffs'/appellees' Motion for Class Action Certification, declared IC 35-1-58.5-2(a)(2), Burns' Ind. Stat. Ann. § 10-108(a)(2) unconstitutional, and permanently enjoined the defendants/appellants from enforcing said statute. See Appendix A.

Material Facts

This appeal arises from the declaration by the three-judge District Court that the portion of the Indiana abortion statute, requiring parental consent for unmarried pregnant women under eighteen (18) years of age, is unconstitutional. That statutory provision, IC 35-1-58.5-2(a)(2), Burns' Ind. Stat. Ann. § 10-108(a)(2) provides as follows:

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:
>
> (a) During the first trimester of pregnancy for reasons based upon the professional medical judgment of the pregnant woman's physician provided:
>
> • • •
>
> (2) The woman submitting to the abortion has filed her consent with said physician. If said woman is unmarried and is less than eighteen (18) years of age, said consent shall be joined by a parent or other person in loco parentis . . .

The District Court concluded that this action could be properly maintained as a class action and determined that Jane Doe was an adequate representative of the plaintiff class of unmarried pregnant women under eighteen (18) years of age. In regard to Jane Doe's challenge to the Indiana statutory provision requiring parental consent, the Court said:

> . . . This issue has recently been decided by the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth,* 44 U.S. L.W. 5197 (July 1, 1976) . . . It is therefore the decision of this Court, following the precedent set forth in *Danforth,* that the provision in the Indiana abortion Law, IC 35-58.5 (a)(2) Burns Ind. Stat. Ann. 10-108(a)(2), which requires the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy is unconstitutional. This Court now enters a permanent injunction prohibiting defendants Bowen, Kowalczyk, Indiana State Board of Health, Paynter, and Sendak, their agents, assigns, Successors, and all others similarly situated from enforcing IC 35-1-58.5 (a) (2), Burns Ind. Stat. Ann. § 10-108(a)(2).

REASON WHY QUESTION IS SUBSTANTIAL

It is the appellants' contention that the three-judge District Court erred in concluding that the parental consent provision of the Indiana abortion statute is unconstitutional. The exclusive basis of the Court's decision was *Planned Parenthood of Central Missouri v. Danforth,* — U.S. —, 96 S. Ct. 2831 (1976) (hereinafter referred to as *Planned Parenthood*). The appellants would first assert that the District Court abused its discretion by applying *Planned Parenthood* to the case at bar in light of the factual differences between the two cases. In the *Planned Parenthood* decision, it was noted that no other

Missouri statute specifically requires the additional consent of a minor's parent for medical and surgical treatment. *Planned Parenthood, supra* at p. 2843. By contrast, Indiana law provides as follows:

> Consent to medical or surgical treatment of a person (herein called the "patient") incompetent to give such consent by reason of minority . . . may be given by the following persons, . . .
>
> (a) If the patient is an unmarried unemancipated minor, by one (1) parent having custody of such minor, Provided that if there is no such parent, by the legal guardian of the minor, . . .
>
> • • •
>
> For the purposes of this chapter [16-8-3-1, 16-8-3-2], a "minor" or a person incompetent by reason of "minority" shall mean any person under eighteen (18) years of age.
>
> IC 16-8-3 1, Burns' Ind. Stat. Ann. § 35-4407.

Thus in Indiana, the statutory provision at issue herein is consistent with other statutory provisions governing surgical and medical treatment. In order to protect the authority of the family relationship and the welfare of children in general, Indiana has exercised its police power in this area. Missouri, on the other hand, had isolated abortion from other surgical and medical procedures by requiring parental consent only in the abortion situation.

This Court's holding in *Planned Parenthood* is not applicable to a situation such as exists in Indiana where there are other medical/surgical statutes requiring parental consent. Furthermore, application of *Planned Parenthood* to the case at bar calls into question the viability of a separate Indiana statutory provision, IC 16-8-3-1, Burns' Ind. Stat. Ann. § 35-4407, previously

quoted. In Missouri, where no similar statute existed, the *Planned Parenthood* decision did not have such serious potential ramifications. The appellants would assert that the factual differences between this case and *Planned Parenthood* as well as the serious implication raised by application of the *Planned Parenthood* holding to the case at bar present a substantial question for this Court's consideration.

Secondly, the appellants would emphasize that there are considerations which this Court overlooked in the *Planned Parenthood* decision which compel reevaluation. In reaching its decision in *Planned Parenthood,* this Court relied upon *Roe v. Wade,* 410 U.S. 113 (1973) where it was held that a woman's right to decide whether to abort a pregnancy is entitled to constitutional protection. *Planned Parenthood* as well as the cases cited therein, all of which have considered the parental consent issue in light of *Roe v. Wade, supra,* have misapplied the *Roe* holding. The *Roe* case dealt with women, not children. Children have always been given special consideration under the law, and there is no rationale for equating children with women in the abortion area alone.

The individual states have traditionally taken a strong interest in the welfare of their young citizens. In Indiana that interest is reflected in a whole variety of protective measures including some statutes requiring parental consent and others involving general prohibitions. As was pointed out above, in Indiana a parent or legal guardian must consent to the medical or surgical treatment of a minor. IC 16-8-3-1, Burns' Ind. Stat. Ann. § 35-4407. That requirement extends to procedures as elementary as getting one's ears pierced. A female under eighteen (18) years of age must obtain parental permission to marry, IC 31-1-1-4, Burns' Ind. Stat. Ann. §-44-202, and a person

under seventeen (17) years of age may not donate blood in any voluntary, non-compensatory blood program without parental authorization, IC 16-8-2-1, Burns' Ind. Stat. Ann. § 35-4412. A minor may not attend theaters showing films which are considered "harmful to minors," IC 35-30-11.1-1, Burns' Ind. Stat. Ann. § 10-831. Furthermore, the State regulates the employment of children, IC 35-14-3-2 *et seq.,* Burns' Ind. Stat. Ann. § 10-808 *et seq.,* and prohibits them from entering pool rooms, taverns and nightclubs, IC 35-1-104-14, Burns' Ind. Stat. Ann. § 10-2318; IC 7-2-1-9, Burns', Ind. Stat. Ann. § 12-438. It is unlawful in Indiana to sell tobacco products to persons under eighteen (18) or to furnish them weapons. IC 35-1-105-2, Burns' Ind. Stat. Ann. § 10-802; IC 35-1-79-3, Burns' Ind. Stat. Ann. § 10-4702. There are thus a number of areas relating to health and welfare in which the State exercises restraints over a young person where similar restraints upon adults might be unconstitutional.

It is clear that the abortion decision is far more important than some of the decisions covered by the Indiana statutory provisions discussed above. It is equal in importance, however, to a decision of marriage. The abortion decision, whichever choice is made, is likely to have profound and lasting effects upon a young person's life, as is the decision to marry. The great importance of the abortion decision only supports and reinforces the appellants' contention that the abortion decision should be made only after thorough and rational consideration of all the alternatives. With that in mind, this Court in *Planned Parenthood* concluded that a State may insist that the abortion decision not be made without the benefit of medical advice. The appellants would assert that the medical considerations involved in an abortion are no more significant than the

possible emotional consequences. Of course there is no guarantee that a parent will be a positive influence in this decisionmaking process, but such a guarantee is nonexistent in any legislative determination. Virtually all legislation benefits some persons more than others, and in some instances, a few suffer so that the majority may benefit or be protected. Since the majority of parents are sincerely interested in their child's welfare, it may be assumed that as adults, they will, for the most part, be of beneficial assistance in an evaluation of the abortion decision. As Justice Stevens states in his separate opinion in *Planned Parenthood* at p. 2856:

> A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational.

In *Planned Parenthood* this Court was concerned with the statute because the parental consent provision covered *all* pregnant females under eighteen (18) years of age. The Court suggested that a provision requiring parental consent might be acceptable if it provided for a determination of maturity before it was applied. Such a provision would be difficult to devise so as to encourage effective and equitable application. The appellants would admit that any age limitation is arbitrary and potentially unfair to some individuals, but would emphasize the number of statutory provisions which have drawn that line. Obviously, at any given age, some persons are more mature than others. The appellants thus recognize that some females under eighteen (18) years of age are capable of handling the abortion decision. Likewise, however, some are capable of deciding if and when they should marry. In fact, almost any statute having an age restriction is applicable to some

individuals who, for a number of reasons, may not need the protection the statute is designed to offer. In the alternative, however, it is just as arbitrary and unfair to remove *all* age restrictions. That forces upon young females, who are not able to handle the situation alone, though they may not realize it, a decision of great magnitude with only a physician, often a stranger, to advise them.

This Court in *Planned Parenthood* stated:

> . . . the State does not have the Constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.
>
> *Planned Parenthood, supra* at p. 2843.

The appellants would argue that statement has far-reaching implications which this Court may have overlooked. The Court's holding in *Planned Parenthood* clearly calls into question the Constitutional validity of the Indiana statutes previously cited which limit in some way the conduct of minors. In addition, it casts doubt upon the validity of Indiana's "statutory rape" provision in which the State has long assumed that a child under sixteen (16) years of age is not capable of rendering a willing consent. IC 35-13-4-3, Burns' Ind. Stat. Ann. § 10-4201. Even more disconcerting, however, is the startling implication the *Planned Parenthood* holding carries for a totally distinct area of the law. "Minority" is merely one form of legal incompetency. The very same statutes which limit the activities of a minor also regulate the conduct of the mentally ill, the insane, the alcoholic, and the drug addict. IC 16-8-3-1, Burns' Ind. Stat. Ann. § 35-4407; IC 29-1-18-41, Burns' Ind. Stat. Ann. § 8-141. In *Planned Parenthood,*

this Court does not differentiate between the mentally healthy minor and the insane minor but suggests that *any* minor is competent to make the abortion decision. If the State has no authority to regulate the life of an insane minor, it would be ludicrous to suggest it has that authority over an insane adult. In *Planned Parenthood,* this Court in effect destroys the underlying rationale for all provisions by which the State heretofore has regulated and protected the incompetent. Application of the *Planned Parenthood* holding to analogous situations could cast doubt upon all sorts of State regulations, formerly unquestioned, which, though totally unrelated to the abortion issue raised here, are directly implicated and potentially affected thereby.

In view of the burden and responsibility the *Planned Parenthood* decision places upon young females, the illogical reasoning it applies to the abortion situation, and the far-reaching consequences of its application, the appellants would assert that the District Court abused its discretion by granting a permanent injunction to the plaintiffs/appellees. They would further assert that the question presented by this appeal regarding the error of the three judge District Court in declaring the Indiana statute unconstitutional is so substantial as to require plenary consideration. For those reasons this Court should reconsider its recent decisions in this vital area.

CONCLUSION

For all the above and foregoing reasons, the appellants respectfully pray this Court note probable jurisdiction in this cause.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated; *Plaintiffs,*	)	
v.	)	No. H 74-289
OTIS BOWEN, Governor of the State of Indiana; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner and the Executive Officer of the Indiana State Board of Health; THEODORE SENDAK, Attorney General of the State of Indiana; Their agents, assigns, successors, representatives, those acting in concert with them, and all others similarly situated; *Defendants.*	)	

ORDER AND MEMORANDUM

On May 29, 1975 this Court received from plaintiffs a motion for class action certification and determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure.

The Court now GRANTS plaintiffs' motion and orders this action to be continued as a class.

Further pursuant to *Planned Parenthood of Central Missiour v. Danforth,* 44 U.S.L.W. 5197 at 5203-5204 (July 1, 1976), this Court now enters a permanent injunction prohibiting defendants Bowen, Kowakczyk, Indiana State Board of Health, Paynter, and Sendak, their agents assigns successors and all others similarly situated from enforcing Indiana Abortion Law, IC 1971, 35-1-58.5 (a)(2) (Burns Ind. Ann. Stat. §10-108(a)(2)).

FACTS

On November 13, 1974 the plaintiffs filed their complaint challenging the constitutionality of certain provisions of the Indiana Abortion Law. IC 1971, 35-1-58.5 (Burns Ind. Ann. Stat. §§ 10-107—10-114). The plaintiffs were three pregnant women:

1. Brigitte Coe, who was in her third terimster of pregnancy at the time the complaint was filed. She alleged that the conditions and procedures required during the third trimester under the Indiana Statute are too restrictive.

2. Mary Roe, while in her second trimester of pregnancy sought to have an abortion performed at the Gary-Northwest Clinic. She was refused, however, by her physician since the Indiana Statute requires that abortions performed in the second trimester must be performed in a hospital. Indiana Abortion Law. IC 1971 35-1-58.5(b) Burns Ind. Ann. Stat. § 10-108 (b).

3. Jane Doe, an unmarried minor, 16 years of age who sought an abortion without her parents' consent. She challenges the provision of the Indiana Abortion Law which requires parental consent where the women is unmarried

and is less than 18 years of age. Indiana Abortion Law, IC 1971, 35-1-58.5(a)(2) (Burns Ind. Ann. Stat. § 10-108 a)(2).

Plaintiffs requested a temporary restraining order, preliminary and permanent injunctions, prohibiting the defendants from enforcing the contested provisions of the Indiana Abortion Law and requested this Court to notify the Chief Judge of the United States Court of Appeals for the Seventh Circuit to convene a statutory three judge court to hear this issue.

On November 19, 1974 the Honorable Luther Swygert, the Seventh Circuit, designated the Honorable Robert A. Sprecher, United States Circuit Judge for the Seventh Circuit, and the Honorable Jesse E. Eschbach, United States District Judge for the Northern District of Indiana, to serve with the Honorable Allen Sharp as members of a three judge United States District Court.

On December 13, 1974 a hearing was held to consider the appropriateness of granting temporary relief. The Court treated plaintiffs' request as one for a preliminary injunction. On January 31, 1975 the three judge District Court found:

1. Brigitte Coe not entitled to injunctive relief.

2. Mary Roe not entitled to injunctive relief.

3. Jane Doe entitled to injunctive relief and issued an order preliminarily enjoining the defendant Indiana State Officials named in the caption from enforcing Indiana Abortion Law, IC 1971 35-1-58.5(a)(2) (Burns Ind. Stat. Ann. § 10-108(a)(2).

On May 29, 1975 plaintiffs filed a motion for class action certification and determination pursuant to Rule 23(c)( ) of the Federal Rules of Civil Procedure.

ANALYSIS AND CONCLUSIONS

In order to maintain a class action suit one must meet the requirements of Rule 23(a) and Rule 23(b) of the Federal Rules of Civil Procedure. Under Rule 23(a) the prerequisites to a class action are:

1. The class is so numerous that joinder of all members is impracticable.

2. There are questions of law or fact common to the class.

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class, and

4. The representative parties will fairly and adequately project the interests of the class.

This Court is convinced that Jane Doe is an adequate representative of the class of unmarried pregnant women under 18 years of age. And further, this class clearly meets the requirements of Rule 23(a). In addition, this Court is convinced that plaintiff, Jane Doe, representative class also meets the prerequisite of Rule 23(b). Since it is likely that should this action be maintained separately by individual plaintiffs, inconsistant adjudications may result. Therefore, a class action suit is clearly "superior to other available methods for the fair and efficient adjudication of the controversy". Rule 23(b)(3).

Consequently, it is the determination of this Court that this action may properly be maintained as a class action and that Jane Doe is an adequate representative of the plaintiff class of unmarried pregnant women under 18 years of age.

Plaintiff, Jane Doe, challenges the Indiana Abortion Law provision requiring the consent of the unmarried woman's

parent or other person *in loco parentis*, if such woman is under 18 years of age. This issue has recently been decided by the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth*, 44 U.S.L.W. 5197 (July 1, 1976).

In *Danforth*, the Supreme Court held that states may not require the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the ~~last~~ first 12 weeks of her pregnancy:

> "[t]he state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding consent.
>
> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See *Breed v. Jones*, 421 U.S. 519 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *In Re Gault*, 387 U.S. 1 (1967)." Id at 5203-4.

Prior to this decision other courts reached similar results. See, *Poe v. Gerstein*, 517 F. 2d at 792; *Wolfe v. Schroering*, 388 F. Supp. at 636-637; *Doe v. Rampton*, 366 F. Supp. at 193, 199; *State v. Koome*, 84 Wash. 2d 901, 530 F. 2d 260 (1975).

It is therefore the decision of this Court, following the precedent set forth in *Danforth*, that the provision in the Indiana Abortion Law, IC 35-1-58.5(a)(2) Burns Ind. Stat. Ann. 10-108(a)(2), which requires the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her preg-

nancy is unconstitutional. This Court now enters a permanent injunction prohibiting defendants Bowen, Kowalczyk, Indiana State Board of Health, Paynter, and Sendak, their agents, assigns, Successors, and all others similarly situated, from enforcing IC 35-1-58.5(a)(2), Burns Ind. Stat. Ann. § 10-108(a)(2).

Dated this 14 day of September, 1976.

ROBERT A. SPRECHER
Circuit Judge

JESSE E. ESCHBACH
District Judge

ALLEN SHARP
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated; *Plaintiffs,*	)	
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SEPARATE STATEMENT

I must concur in the order and judgment of this Court in accord with my apparent obligation to follow the precedents of our highest Court. I do so with the greatest reluctance. I write briefly to state the basis of that reluctance.

Over the strong protests of well-reasoned dissents our highest Court has now vested in a mother, regardless of

age or parental or marital consent, the absolute right to terminate human life in a clearly identifiable form during the first three months of its existence, and to do so without regard to any particular medical procedure. *Roe v. Wade,* 410 U.S. 113 (1973); *Planned Parenthood of Missouri v. Danforth,* — U.S. — (1976). From the end of the first trimester until viability, the state "may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. For the state subsequent to viability, the state in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade,* 410 U.S. at 165 (1973). These decisions are based on the principle that "the word 'person', as used in the Fourteenth Amendment, does not include the unborn." Id., at 158.

This result is articulated on the basis of a recently and judicially expanded constitutional right to privacy. This concept found its origin in no specific provision of a written constitution. The concept of privacy was generally a concept of tort law finding its origins in the 1890 Harvard Law Review under the authorship of Warren and Brandeis. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). It has now become a watery constitutional concept that can run in any direction chosen by at least five members of the highest Court. (See the various opinions in *Griswold v. Conn.,* 361 U.S. 479 (1965)). When such water tends to erode the basic right to life itself under the Fourteenth Amendment, all members of the Judiciary, regardless of where they sit, should be extremely careful. This is manifestly an area for the greatest of judicial restraint.

As one who has been engaged both in the making and following of precedent this writer is well aware that our system presupposes the following of clear precedents by the lower levels of the judiciary. However, when the underlying values involve human life itself, I do not deem it an obligation to mechanically follow a questionable precedent without a stated concern. One of the basic ideas of Western thought has been the sacredness of human life at all stages. That right was apparently secularized in the Fourteenth Amendment. The right to life is the most fundamental human right. As the Supreme Court noted in another context, it is "the right to have rights." *Furman v. Georgia,* 408 U.S 238, 290 (1972). Those ideas were apparently embodied in the Fourteenth Amendment's basic protections. Congressman John Bingham, who sponsored the Fourteenth Amendment in the House of Representatives, described the Amendment as having universal application and observed that it applied to "any human being." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866). Senator Allen A. Thurman, commenting on the equal protection clause of the Fourteenth Amendment, stated that "[It] covers every human being within the jurisdiction of a state. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws." 3 Cong. Rec. 1794 (1875) (emphasis added). The Supreme Court has ruled that, whether or not the unborn child is a human being, he is not a person. *Roe v. Wade,* supra. This implicitly accepts the concept that innocent human beings can be declared non-persons and thereby deprived of constitutional protection. Given the nature of constitutional adjudication there will undoubtedly be pressures to extend this concept of non-persons. My concept of the proper functioning of precedent has always included a hard look at

precedents whose basis should be reexamined. See *Theis v. Heuer*, 149 Ind. App. 52, 270 N.E. 2d 764, — Ind. —, 280 N.E. 2d 300 (1971). This writer respectfully suggests that we ought to reexamine the denial of personhood to all unborn children.

In his classical dissent, Mr. Justice Frankfurter in *Baker v. Carr*, 369 U.S. at page 266, 330 (1962), suggested the Court was inviting itself into a political thicket. A most casual reading of the reported decisions of the Federal Judiciary since 1962 will easily demonstrate the accuracy of that prediction. One might also accurately predict that the Court has now invited itself into a medical and moral thicket. We cannot soon foresee our early extrication therefrom.

More than two decades ago Mr. Justice Jackson reminded us that the basic uniqueness of the highest Court is finality. (See concurring opinion of Jackson, J., in *Brown v. Allen*, 344 U.S. 443, 540 (1953)). That comment is most appropriate in the context of these cases. With the highest personal regard for those nine men, finality does not always insure wisdom. See *Dred Scott v. Sandford*, 19 Howard 393 (1857). It is therefore the right and obligation of all members of this constitutional society to concern themselves with the wisdom of decisions affecting the basics of life itself. I write here only to express one Judge's deepest concern for those basics.

Neither the courts nor the Legislature should limit by definition the concept of "persons" without the greatest soul searching. That process is at the heart of this brief statement.

Dated September 14, 1976.

ALLEN SHARP

Judge, U.S. District Court

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated; *Plaintiffs,*	)	
v.	)	No. H 74-289
OTIS BOWEN, Governor of the State of Indiana; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner and the Executive Officer of the Indiana State Board of Health; THEODORE SENDAK, Attorney General of the State of Indiana; Their agents, assigns, successors, representatives, those acting in concert with them, and all others similarly situated; *Defendants.*	)	

ORDER OF JUDGMENT

On November 13, 1974 plaintiffs filed this action seeking a temporary restraining order, declaratory judgment and preliminary and permanent injunctive relief against various Indiana officials charged with enforcement of the

Indiana Abortion Statute: BURNS IND. ANN. STAT. §§ 10-107—10-114. A three-judge court was convened. On December 13, 1974 a hearing was held to consider the appropriateness of granting temporary relief. The defendants were advised, present and allowed to participate in the hearing, and we therefore treat plaintiffs' request as one for a preliminary injunction.

Plaintiffs are the Gary-Northwest Indiana Women's Services, Inc., Dr. William R. Lewis, and three pregnant women—Brigitte Coe, Mary Roe, Jane Doe. The defendants are state and county officials charged with the enforcement of the Indiana abortion statute.[1] Jurisdiction is alleged to be based on 28 U.S.C. § 1343, 1331. We consider the request for preliminary relief of each of the three women separately.[2]

Brigitte Coe

Brigitte Coe at the time the complaint was filed was in the third trimester. She alleged that it was her treating physician's professional medical judgment that an abortion was necessary to prevent a substantial permanent impairment of her life and mental health. Plaintiff Coe alleges that restrictions as to what conditions and what procedures may be used during the third trimester are too restrictive. She challenges the following portions of the statute:

---

[1] The defendants are the Governor, Lake County prosecutor, Executive Officer of Indiana State Board of Health, State Attorney General and their agents and representatives.

[2] Although *Friendship Medical Center, Ltd. v. Chicago Board of Health* No. 74-1070 (7th Cir., October 30, 1974), held that a physician has standing to challenge abortion regulations, we believe that in these cases the plaintiff-physician has not made a sufficient showing of irreparable injury to entitle him to the requested injunctive relief where his patient for some reason is not entitled to injunctive relief.

Abortion shall in all instances be a criminal act except when performed under the following circumstances:

• • •

(c) After viability of the fetus for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:

• • •

(2) Prior to the abortion the attending physician shall certify in writing to the hospital in which the abortion is to be performed, that in his professional, medical judgment, after proper examination and review of the woman's history, the abortion is necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman. All facts and reasons supporting said certification shall be set forth by the physician in writing and attached to said certificate.

(3) The saline method of abortion shall not be used.

BURNS' IND. ANN. STAT. § 10-108(c).

At the hearing, the court was informed that plaintiff Coe had received an abortion in another state. Without deciding whether plaintiff Coe no longer has standing to seek further relief or whether she may serve as a named plaintiff for a class of women similarly circumstanced, we hold that her request for a preliminary injunction should be denied.

It is uncontroverted that a preliminary injunction should not issue unless the plaintiff has made a showing of likelihood of prevailing on the merits and that without such relief they will be irreparably injured. 7 J. MOORE, FEDERAL PRACTICE ¶65.04[1]. In the present case it is quite clear that plaintiff cannot sustain her burden of showing irreparable injury. Since the issuance of equitable relief

would be a futile effort as regards plaintiff Coe, her request for a preliminary injunction is denied. ***Manion v. Holzman,*** 379 F.2d 843 (7th Cir.), ***cert. denied,*** 389 U.S. 976 (1967).

Mary Roe

Mary Roe was first seen by Dr. Lewis on September 18, 1974. She was at that time approximately 16-18 weeks pregnant. She was then in excellent health and sought to have an abortion performed at the Gary-Northwest Clinic. Dr. Lewis refused her request for an abortion because she was in her second trimester and the Indiana abortion statute provided:

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:
>
> • • •
>
> (b) After the first trimester of pregnancy and before viability, for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:
>
> • • •
>
> (2) It is performed in a hospital.

BURNS' IND. ANN. STAT. § 10-108(b).

Plaintiff Roe challenges the hospital requirement for second trimester abortions. The court has determined that a preliminary injunction on her claim should not issue.

In *Roe v. Wade,* 410 U.S. 113 (1973), the Supreme Court held that from and after the first trimester that a state could regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* at 163. The Supreme Court went on to say:

> Examples of permissible state regulation in this area [maternal health] are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; *as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital-status;* as to the licensing of the facility; and the like.

Id. (emphasis added).

Whether a hospital requirement for the second trimester per se comports with a "reasonable regulation" standard is not certain and need not be decided at this point. But at the very least in instances where a preliminary injunction is sought and the plaintiff bears the burden of showing a likelihood of ultimately prevailing, the foregoing language of the Court is sufficient grounds for denying the requested preliminary relief.

Jane Doe

Jane Doe, a resident of Gary, Indiana, is an unmarried minor 16 years of age who seeks an abortion in the State of Indiana. Plaintiff Doe first went to see Dr. Lewis at the Gary-Northwest Clinic during the beginning of October 1974. At that time she was approximately 6-8 weeks pregnant and in excellent health. At the time of the hearing in this matter she was approximately 17-19 weeks pregnant.

Plaintiff Doe challenges the provision of the Indiana Abortion Law that provides:

> Abortion shall in all instances be a criminal act except when performed under the following circumstances:
>
> (a) During the first trimester of pregnancy for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:
>
> • • •

> (2) The woman submitting to the abortion has filed her consent with said physician. If said woman is unmarried and is less than eighteen [18] years of age, said consent shall be joined by a parent or other person in loco parentis . . .

BURNS' IND. ANN. STAT. § 10-108(a).

While it is true that the Supreme Court in *Roe v. Wade,* 410 U.S. 113 (1973), specifically refused to consider whether parental consent statutes were constitutional, *Id.* at 165 n.67, there is increasing authority for the proposition that such provisions are invalid. *Coe v. Gerstein,* 376 F. Supp. 695 (S.D. Fla. 1974) (3 judge court) *appeal docketed,* No. 73-1157, 42 U.S.L.W. 3441 (U.S. January 28, 1974); *In the Matter of P.J.,* 12 Cr. L. Rptr. 2549 (D.C. Super Ct., February 6, 1973);[3] *cf. In re Smith,* 16 Md. App. 209, 295 A.2d 238 (1972); *Ballard v. Anderson,* 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

In *In the Matter of P.J., supra,* the court ruled that the mere status of minority should not render a person incompetent to make an abortion decision. The court ruled that a 17 year old be permitted to have an abortion despite the objection of her mother, who had cared for her daughter's first child.

In *Coe v. Gerstein, supra,* the court held unconstitutional a Florida statute requiring parental consent for minors under 18 years of age before an abortion could be performed. The court said:

> We are persuaded that if the State cannot interfere to protect the fetus' interest in its potential life until

[3] *See generally Note, The Minor's Right to Abortion and the Requirement of Parental Consent,* 60 VA. L. REV. 305 (1974).

> the compelling point of viability is reached, neither can it interfere on behalf of . . . parents . . .
>
> • • •
>
> The failure of the Florida ". . . parental consent" requirement is that it gives to . . . parents the authority to withhold consent for abortions for any reason or no reason at all. It allows a . . . parent to withhold consent out of concern for maternal health or the potential life of the fetus, in addition to other compelling reasons each may have for doing so.
>
> As we learn from *Roe v. Wade, supra,* the State has no authority to interfere with a woman's right of privacy in he first trimester to protect maternal health nor can it interfere with that right before the fetus becomes viable in order to protect potential life. It follows inescapably that the State may not statutorily delegate to . . . parents an authority the State does not possess.
>
> We do not learn from the opinion in *Roe v. Wade, supra,* the age of plaintiff Roe, the pregnant woman who enjoyed the "fundamental", "*personal* right of privacy" [emphasis supplied] recognized by the Supreme Court. *But we do know that a pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to "fundamental", "personal", constitutional rights.*

376 F. Supp. at 697-98 (emphasis added).

Furthermore, plaintiff alleges that the Indiana statute unreasonably discriminates against unmarried females under 18 years of age where the marital status of the individual should be of no significance. Since at present there is no requirement that we know of in Indiana that a husband or anyone else give their consent before a minor wife may obtain an abortion, plaintiffs may ultimately be

able to show that the line drawn between two similar classes of women by the Indiana legislature serves no valid purpose.

Findings of Fact and Conclusions of Law

1. Brigitte Coe, because of her pregnancy has already been aborted, is not entitled to injunctive relief because she has failed to satisfy the court that a denial of such relief will cause her irreparable injury.

2. Mary Roe was at the time this action was filed in her second trimester. The court finds that the plaintiff Roe has first failed to establish that the Indiana hospital requirement for second trimester abortions is unreasonable and thereby inconsistent with the Supreme Court's holding in *Roe* and therefore has not convinced the court that she has a substantial likelihood of success on the merits. Accordingly, her request for injunctive relief is denied.

3. Jane Doe is an unmarried minor 16 years of age who desires an abortion and does not have the consent of either parent as required by BURNS' IND. ANN. STAT. §-10-108(a)(2). At the time of the hearing in this cause she was approximately 17-19 weeks pregnant. Plaintiff Doe has convinced this court that (1) unless granted the preliminary relief requested she will suffer irreparable and immediate injury, and (2) that there is a substantial likelihood that she will eventually be successful on the merits. Therefore, the court will issue an order preliminarily enjoining the defendant Indiana State officials named in the caption from enforcing against plaintiffs that portion of BURNS' IND. ANN. STAT. §10-108(a)(2) which requires that an unmarried woman under 18 years

of age obtain the consent of a parent before being able to procure an abortion.

Dated this 31st day of January, 1975.

ROBERT A. SPRECHER
United States Circuit Judge

JESSE E. ESCHBACH
United States District Judge

ALLEN SHARP
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.: WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated;	)	
v.	)	No. H 74-289
OTIS BOWEN, Governor of the State of Indiana; et al.	)	

SEPARATE STATEMENT

Since *Roe v. Wade,* 410 U.S. 113 (1973), does not explicitly decide the questiion of parental consent to an abortion for a minor, I would reserve that question for a full determination here on the merits, rather than on a preliminary injunction.

Enter: January 31, 1975

ALLEN SHARP
Judge, U.S. District Court

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; and all others similarly situated; *Plaintiffs,*	)	
v.	)	No. H 74-289
OTIS BOWEN, Governor of the State of Indiana; HENRY KOWALCZYK, Lake County Prosecutor; INDIANA STATE BOARD OF HEALTH; WILLIAM T. PAYNTER, M.D., State Health Commissioner and the Executive Officer of the Indiana State Board of Health; THEODORE SENDAK, Attorney General of the State of Indiana; Their agents, assigns, successors, representatives, those acting in concert with them, and all others similarly situated; *Defendants.*	)	

NOTICE OF APPEAL

Notice is hereby given that Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney

General of the State of Indiana; Henry Kowalczyk, as Lake County Prosecutor; William T. Paynter, M.D., as State Health Commissioner and the Executive Officer of the Indiana State Board of Health; and the Indiana State Board of Health, their agents, assigns and successors, hereby appeal to the Supreme Court of the United States from the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, dated September 14, 1976, which entered a permanent injunction prohibiting defendants Bowen, Sendak, Kowalczyk, Paynter and the Indiana State Board of Health, their agents, assigns, successors, and all others similarly situated, from enforcing IC 35-1-58.5(a)(2), Burns Ind. Stat. Ann. § 10-108(a)(2).

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

SUSAN J. DAVIS
Deputy Attorney General

Attorneys for Defendants-Appellants

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was deposited in the United States mail, first class, postage prepaid, addressed to counsel of record listed below this 6th day of October, 1976.

JULIAN B. WILKINS, Esquire
77 W. Washington, Suite 1012
Chicago, Illinois 60602

W. HENRY WALKER, Esquire
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East Chicago, Indiana 46312

SUSAN J. DAVIS
Deputy Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-764

OTIS BOWEN, GOVERNOR OF THE STATE OF INDIANA; HENRY KOWALCZYK, LAKE COUNTY PROSECUTOR; INDIANA STATE BOARD OF HEALTH: WILLIAM T. PAYNTER, M.D., STATE HEALTH COMMISSIONER AND THE EXECUTIVE OFFICER OF THE INDIANA STATE BOARD OF HEALTH; THEODORE L. SENDAK, ATTORNEY GENERAL OF THE STATE OF INDIANA; THEIR AGENTS, ASSIGNS, SUCCESSORS, REPRESENTATIVES, THOSE ACTING IN CONCERT WITH THEM, AND ALL OTHERS SIMILARLY SITUATED,

Appellants,

vs.

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; AND ALL OTHERS SIMILARLY SITUATED,

Appellees.

MOTION TO AFFIRM JUDGMENT AND BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT.

JULIAN B. WILKINS, ESQ.,
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Appellants,

vs.

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; AND ALL OTHERS SIMILARLY SITUATED,

Appellees.

MOTION TO AFFIRM JUDGMENT.

Come now the Appellees, The Gary-Northwest Indiana Women's Services, Inc., William R. Lewis, M.D.; Jane Doe; Mary Roe; Brigitte Coe; and all others similarly situated, by Julian B. Wilkins, Esq. and W. Henry Walker, Esq., their attorneys, and pursuant to Rule 16(c) of the Rules of the Supreme Court, move this Court to affirm judgment entered September 14, 1976 by the three-judge panel of the United States District Court for the Northern District of Indiana, Hammond

Division, on the grounds that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument in that all questions raised by the Jurisdictional Statement filed by Appellants have been fully disposed of in this Court's decision in *Planned Parenthood of Central Missouri* v. *Danforth,* ..... U. S. .....; 96 S. Ct. 2831 (1976).

The following Brief is submitted in support of this Motion and in opposition to the Jurisdictional Statement filed by Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-764

OTIS BOWEN, GOVERNOR OF THE STATE OF INDIANA; HENRY KOWALCZYK, LAKE COUNTY PROSECUTOR; INDIANA STATE BOARD OF HEALTH: WILLIAM T. PAYNTER, M.D., STATE HEALTH COMMISSIONER AND THE EXECUTIVE OFFICER OF THE INDIANA STATE BOARD OF HEALTH; THEODORE L. SENDAK, ATTORNEY GENERAL OF THE STATE OF INDIANA; THEIR AGENTS, ASSIGNS, SUCCESSORS, REPRESENTATIVES, THOSE ACTING IN CONCERT WITH THEM, AND ALL OTHERS SIMILARLY SITUATED,

Appellants,

vs.

THE GARY-NORTHWEST INDIANA WOMEN'S SERVICES, INC.; WILLIAM R. LEWIS, M.D.; JANE DOE; MARY ROE; BRIGITTE COE; AND ALL OTHERS SIMILARLY SITUATED,

Appellees.

BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT.

QUESTION PRESENTED.

The Three-Judge District Court decision entered September 14, 1976 is the subject matter of this appeal. It declared un-

constitutional a provision of the Indiana Abortion Law that required that the consent of a parent or other person in *loco parentis* must be obtained before an abortion may be performed on an unmarried woman who is less than 18 years of age. The question is simply whether that conclusion was proper.

ARGUMENT.

This Court decided in *Planned Parenthood of Central Missouri* v. *Danforth*, ... U. S. .....; 96 S. Ct. 2831 (1976) (which case is hereinafter referred to as the *Planned Parenthood* case) that a statute requiring a blanket parental consent must be had before an abortion may be performed on a minor is unconstitutional. The three-Judge District Court in this case applied that decision and invalidated the Indiana statute.

Appellants argue that this case, which involves the laws of Indiana, is factually a different case that the *Planned Parenthood* case, which involved the laws of Missouri, for the reason that Indiana, unlike Missouri, in addition to the parental consent provisions in the abortion statute, also had a general statute requiring parental consent for surgical procedures on minors. Appellants also argue that this Court in the *Planned Parenthood* decision overlooked considerations relating to the special position given to minors and other incompetents by the law generally, and that upon reconsideration this Court should modify its own position taken in the *Planned Parenthood* case.

It is the thrust of this Brief that these two positions asserted by Appellants are clearly incorrect and are clearly insubstantial

Appellants assert that it was noted in the *Planned Parenthood* decision that no other Missouri statute required the additional consent of a minor's parent for medical and surgical treatment, whereas, by contrast, Indiana does have such a statute. It is true that this Court in its decision did allude to the argument made to it that there was no other specific Missouri statute relating to parental consent as to medical procedures. But the

Court also alluded to the argument made to it that there was a long list of situations dealing with the conduct of minors which by Missouri law did require parental consent. The difference asserted by Appellants, therefore, is a difference without a distinction. Both Missouri and Indiana have significant statutory patterns that restrict actions by minors and require parental consent.

This Court in *Planned Parenthood* was dealing with a basic constitutional requirement. While recognizing that a State may have broader authority to regulate the activities of children than of adults, this Court went on to say that "it remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of the parent . . . that is not present in the case of an adult." This Court then concluded that "any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor . . ." (96 S. Ct. 2831 at 2843-4).

Appellants also urge a general reappraisal of the basic considerations on the *Planned Parenthood* case in the light of alleged differences between the rights of a "woman" and the rights of "children" and of other classes of people treated by the law as incompetent for one reason or another. Indeed, Appellants assert that there are "startling" implications to the *Planned Parenthood* decision as it relates to the mentally ill, the insane, the alcoholic and the drug addict, and that this Court in its decision has suggested that *any* minor is competent to make the abortion decision.

The difficulty with the position of Appellants is that it directly ignores what this Court said explicitly in the *Planned Parenthood* decision:

> "We emphasize that our holding that Section 3(4) is invalid *does not suggest that every minor, regardless of age or maturity, may give effective consent* for termination of her pregnancy. See Bellotti v. Baird post. The fault with

> Section 3(4) is that it imposes a special consent provision, exercisable by a person other than the woman and the physician, as prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction." (emphasis added) (96 S. Ct. 2831 at 2844.)

The Missouri statute that was being considered in *Planned Parenthood* provided baldly that with respect to minors, a written consent of a parent is required. The Indiana statute that is being considered in this case, provides baldly that as to unmarried minors, the consent must be joined in by a parent. *Planned Parenthood* has held that such a statute is too broad and is unconstitutional. It is respectfully urged that the Indiana statute clearly suffers from the same defect and that it is unconstitutional.

Whether in another case, or with respect to another kind of statute, this Court would wish to review or to refine matters relating to minors and the abortion decision, is not raised by the record of this case.

CONCLUSION.

Appellees respectfully urge this Court to grant their Motion to affirm the judgment of the three-Judge District Court.

Respectfully submitted,

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